

BRIEF OF STANOLIND PIPE LINE COMPANY IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*.

Statement.

The above cause is pending in this court on petition for writ of *certiorari* to the United States Circuit Court of Appeals for the Tenth Judicial Circuit to review the opinion of that court (not officially reported), reversing the opinion of the District Court for the Western District of Oklahoma declaring a statute of Oklahoma (House Bill 589, enacted by the 16th Legislature, approved May 5, 1937, commonly known as the Use Tax Act of 1937, and hereinafter referred to as the "Act") invalid under the Commerce Clause of the Federal Constitution, Article 1, Section 8, Clause 3, as applied to Petitioner. (30 Fed. Supp. 131.)

The following findings of fact and conclusions of law by the trial court, to which Respondent took no exception, are pertinent:

FINDINGS OF FACT.

"During all of the period involved in this suit, Plaintiff, Stanolind Pipe Line Company, owned, maintained and operated a pipe line and pipe line system extending from the State of Texas northward through the State of Oklahoma and other states into the State of Indiana, and received deliveries of oil from connections in Oklahoma exclusively for delivery to points outside the State of Oklahoma." (Tr. 40)

"During the period from May, 1937, to November, 1939, both inclusive, Plaintiff paid under protest, as provided by law, to the Oklahoma Tax Commission as

taxes assessed under the Oklahoma Use Tax Law of 1937, the sum of $8,982.25." (Tr. 41)

"The articles of tangible personal property, consisting of pipe, machinery, repair parts and other items of tangible personal property for the maintenance and upkeep of its pipe line system with respect to the use of which the Oklahoma Use Tax Act was assessed against Plaintiff, were purchased outside the State of Oklahoma to fulfill specific orders for the repair and maintenance of Plaintiff's interstate pipe line system in and through Oklahoma, and said articles were installed as quickly as possible after their arrival into the State of Oklahoma." (Tr. 41)

CONCLUSIONS OF LAW.

"By reason of the diversity of citizenship of the parties hereto and by reason of the fact that the amount involved in controversy exceeds $3,000.00, exclusive of interest and costs, this Court has jurisdiction of this action." (Tr. 41)

"That the business and operations of Plaintiff in connection with the operation and maintenance of its pipe line and pipe line system in and through the State of Oklahoma is exclusively interstate commerce." (Tr. 41)

The findings of fact and conclusions of law quoted are in substantial accord with the stipulation of the parties. (Tr. 39)

Petitioner rests its case on two propositions:

(a) The Act is an excise tax upon the privilege of using tangible personal property in the sense that the property is employed for the accomplishment of a purpose or converted to one's service, and as applied to Petitioner is

a direct and substantial burden upon and interference with its exclusively interstate pipe line business, in violation of and contrary to the Commerce Clause of the Federal Constitution.

(b) If the Act does not levy an excise upon the privilege of use in the sense of employing personal property for the accomplishment of a purpose or converting the property to service, but levies a tax upon storage, keeping or retention of such tangible personal property, or levies a tax upon the incident of ownership, or upon other events prior to converting the property to service in exclusively interstate commerce, then the Act is in violation of and contrary to Article 10, Section 9, of the Constitution of Oklahoma, as amended August 15, 1933.

ARGUMENT *and* AUTHORITIES.

(Emphasis supplied.)

I.

The Oklahoma Use Tax Act of 1937.

The title of the Act, set forth in the Appendix hereto, provided in part "an Act levying an excise tax upon the privilege of using within the State of Oklahoma articles of tangible personal property purchased subsequent to the date of the passage and approval of this Act * * *."

Section 2 declared it to be the purpose of the Act to provide revenue for the support of the functions of state government.

Section 3 defined the meaning of certain terms and phrases when used in the Act. The term "purchase price"

was defined to mean "the consideration paid or given * * * by any person to the Seller of an article of tangible personal property * * *. The term shall include in addition to the consideration paid or given * * * the actual cost of transportation * * *." *The term "use" was not defined in the Act.*

Section 4 of the Article provided: "There is hereby levied and there shall be collected from every person using, within this State, any article of tangible personal property purchased, leased, rented or exchanged subsequent to the date of passage and approval of this Act, an excise tax for the privilege of so using such tangible personal property. Such tax shall be and is hereby levied and shall be collected in an amount equal to two (2%) per centum of the purchase price (as defined in Section 3 of the Act) of such tangible personal property."

Section 5 exempted certain classes of property from the tax; and section 6 provided that if any property had already been subjected to a use or sales tax by Oklahoma or any other state, in an amount less than the tax imposed by the Act, the provisions of the Act should not apply, but the tax should be the difference between the rate therein fixed and the rate of the previous tax. The Act was designed to complement an existing sales tax act which levied a tax at the same rate upon the sale of articles of tangible personal property within the state.

II.

The Act Levies an Excise Upon the Privilege of Use.

The term "use" is not defined in the Act. The Oklahoma Tax Commission, however, under rules and regulations promulgated for the enforcement of the act, defined the term as follows:

"The term 'use' as it appears in the Use Tax Act is hereby defined to be and mean:

"The employment of an article of tangible personal property for the accomplishment of a purpose; to make use of; to treat; to convert to one's service; to avail oneself of; to employ for the attainment of some purpose or end."

It is transparently clear that the legislature intended to enact an excise for the privilege of using within the State of Oklahoma certain articles of tangible personal property purchased, leased, rented or exchanged, subsequent to the passage and approval of the Act. The title of the Act denominated it an excise tax upon the privilege of using. Section 4 of the Act levied an excise for such privilege, measured by a percentum of the purchase price, as elsewhere defined in the Act. Definition of the term "use" contained in the rules and regulations promulgated by the Commission for the enforcement of said act, was an administrative construction of the Act as being an excise upon the privilege of using or employing articles of tangible personal property purchased outside and imported into the state subsequent to the effective date of the Act for the accomplishment or attainment of any purpose.

In *Northern Pacific Ry. Co.* v. *Henneford, et al.*, 15 Fed. Supp. 302, a three-judge court, considering the Use Tax Act of the State of Washington (chapter 180, title 4, Session Laws 1935), containing language almost identical with that used in the Oklahoma law, held that such language operated to levy an excise upon the privilege of using within the state articles of tangible personal property purchased extrastate subsequent to the effective date of the act. The Washington act provided:

> "There is hereby levied and there shall be collected from every person in the state a tax or *excise for the privilege of using* within this state any article of tangible personal property purchased subsequent to April 30, 1935."

In striking down the Washington act, as applied to the interstate business of the Northern Pacific Railway Company, the court said:

> "By the terms of title 4, property is not subject to the compensating tax until it is brought within the state, and *its use within the state is the thing upon which the tax is imposed.*

It was further said:

> "The tax is the *price of the privilege of* using an instrumentality of interstate commerce and as applied to the facts in this case is unconstitutional and void."

The *Northern Pacific* case was brought to this Court and thereafter remanded (January 31, 1938) for dismissal solely on the ground that the necessary jurisdictional amount was not involved. *Henneford, et al.,* v. *Northern Pacific Ry. Co.,* 82 L. ed. 619, 303 U. S. 61.

In the case of *Pacific Telephone and Telegraph Company* v. *Henneford, et al.,* 81 P. (2d) 786, the Supreme Court of the State of Washington (July 29, 1938) accepted the federal court's interpretation of the nature and character of the tax levied by the Washington Use Tax Act of 1935, and, on the ground that such tax was a privilege or excise tax upon the right of the plaintiff to use an instrumentality of interstate commerce, held the tax unconstitutional as applied. Writ of *certiorari* was denied by this Court (February 9, 1939), 83 L. ed. 1038, 306 U. S. 637.

The trial court, in holding the Oklahoma Act invalid under the Commerce Clause as applied to Petitioner, proceeded upon the premise that the Act levied an excise tax upon the privilege of using tangible personal property within the state. *Stanolind Pipe Line Co.* v. *Oklahoma Tax Commission, supra.* It was there said:

> "Clearly, under all of the decisions above quoted, the only 'use' shown in the case at bar is the use in the interstate pipe line equipment, and the tax commission, in its regulations defining the word 'use,' makes no contention that the word 'use' shall have the broad meaning as contained in the California statute—'the exercise of any right or power over tangible personal property incident to the ownership of that property.'
>
> "If the only 'use' complained of is the bringing into the state and installing into the interstate pipe line system the tangible personal property, the basis of the taxation involved in this suit, then clearly this is a use in interstate commerce and is not subject to state taxes."

The court below likewise held that the Act levied an excise upon the privilege of using tangible personal property. *Oklahoma Tax Commission* v. *Stanolind Pipe Line Company, supra.* In passing on this point the court said:

> "It is transparently clear that the tax laid by section 4 of article II was in essence an excise for the privilege of using tangible personal property. *Oklahoma Tax Commission* v. *Sisters of the Sorrowful Mother,* ... Okl. ..., 97 P. (2d) 888; *Vancouver Oil Co.* v. *Henneford,* 183 Wash. 317, 49 P. (2d) 14."

The personel of the Oklahoma Tax Commission has considered and treated the Act as an excise upon only the privilege of using. This is clear from a statement of the Di-

rector, Research Division, Oklahoma Tax Commission, in an address before the National Tax Association at Berkeley, California, on October 17, 1939. Official Proceedings 32nd National Conference, 1939, of the National Tax Association, page 257. It was there stated:

> "Oklahoma's first use tax was levied on the 'privilege of using' any article of tangible personal property, whether such property was 'purchased, leased, rented, or exchanged.' The levying clause of the present law has been broadened to include the 'storage, use or other consumption' of tangible personal property. We should now, consequently, be in a position to collect a use tax on the storage or use of equipment purchased by railroads for use in interstate commerce, under the decision of the U. S. Supreme Court in the *Southern Pacific* case were it not for the fact that, after having broadened the levying clause so as to include the railroads, the legislature granted an outright exemption to railroads in respect of the 'use of tangible personal property by railroads engaged in interstate commerce'."

III.

The tax as applied to petitioner is an unconstitutional burden upon and interference with its right to engage in exclusive interstate commerce.

The use by Petitioner of its pipe lines, pump stations and other equipment and machinery for the accomplishment of its exclusively interstate business of transporting crude petroleum into, out of and through the State of Oklahoma, is, in fact, the use of a composite of various items of tangible personal property purchased within and without the state. Therefore, it must logically follow that a tax by the state upon Petitioner's privilege of using its property is

a direct tax upon the privilege of engaging in interstate business. As was recently said by this Court in *Baldwin* v. *G. A. F. Seelig,* 294 U. S. 511, 522:

> "Imposts and duties upon interstate commerce are placed beyond the power of a state, without the mention of an exception, by the provision committing commerce of that order to the power of the Congress. * * * 'It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business'."

It is true the Court has recognized the authority of the states to lay taxes for regulation and for the protection of the health and safety of its citizens in the absence of the assumption of such authority by Congress, although interstate commerce is involved. The states have also been permitted to lay taxes upon property within their jurisdiction, although the property had moved in interstate commerce, when it was found that the commerce had ended and that the property had come to rest within the state. *Henneford* v. *Silas Mason Co.,* 300 U. S. 577.

On the other hand it is equally clear that any attempt by the state to lay a tax or excise directly upon the privilege or right to engage in interstate business is in violation of the Federal Constitution. *Eureka Pipe Line Co.* v. *Hallanan,* 257 U. S. 265; *United Fuel Gas Co.* v. *Hallanan,* 257 U. S. 277; *Kansas City, Fort Scott and Memphis Ry. Co.* v. *Botkin,* 240 U. S. 227; *Ozark Pipe Line Co.* v. *Monier,* 266 U. S. 555; *Helson & Randolph* v. *Commonwealth of Kentucky,* 279 U. S. 245; *John D. Bingaman* v. *Golden Eagle Western Lines, Inc.,* 297 U. S. 626.

Plainly, to tax the privilege of using certain items of tangible personal property in the conduct of exclusively in-

terstate business is to impose a direct tax upon the operation of interstate commerce, and is beyond the constitutional power of the state.

The court below argues that the tax imposed by the Use Tax Act of 1937 levies a tax upon events prior to the commencement of interstate commerce, as was the case under the California Use Tax Act, considered by this court in *Southern Pacific Co.* v. *Gallagher, et al.*, 306 U. S. 167, 83 L. ed. 586. Such, however, is not and cannot be true under the Oklahoma act. The Oklahoma act imposes a tax solely upon the privilege of using any article of tangible personal property purchased, leased, rented or exchanged, subsequent to the date of the passage and approval of the act. The Oklahoma law does not provide a statutory definition of the term "use". It was, therefore, incumbent upon the Oklahoma Tax Commission, the administrative body charged with the duty of administering the law, to give the term "use" a meaning and application. This was done by appropriate rules and regulations. As before pointed out, the term "use" was defined to mean "*The employment of an article of tangible personal property for the accomplishment of a purpose; to make use of; to treat; to convert to one's service; to avail oneself of; to employ for the attainment of some purpose or end.*"

It will be seen from the Commission's definition that there is no "use" or "using" of tangible personal property within the meaning and interpretation of the Act until there has been an *employment for the accomplishment of a purpose, an actual treating of property, an actual conversion to one's service, an actual availment of one's self of the property, or an actual employment of the property for the attainment of some purpose or end. The taxable event, under*

the Oklahoma statute, arises upon the actual converting of tangible personal property to one's use for the attainment of a purpose or an end.

In contrast to the provisions of the Oklahoma act and the interpretation given the act by the Oklahoma Tax Commission, let us compare the language of the California statute and the administrative interpretation given thereto, which latter interpretation was involved in *Southern Pacific Co.* v. *Gallagher, et al., supra.* The California act provided:

> "An excise is hereby imposed on the *storage, use* or *other consumption* in this state of tangible personal property purchased from a retailer on or after July 1, 1935, for storage, use or other consumption in this state, at the rate of 3% of the sales price of such property."

It will be noted that under the California act three taxable events were created, namely: *(1)* storage, *(2)* use, and *(3)* other consumption.

With respect to the meaning of the term "storage", the California statute contains the following provision:

> "'Storage' means and includes *any* keeping or retention in this state for *any* purpose except selling in the regular course of business, or subsequent use, solely outside this state of tangible personal property purchased from a retailer."

With respect to the meaning and definition of the term "use," the California statute contains the following provision:

> "'Use' means and includes the exercise of *any right or power* over tangible personal property *incident to the ownership* of that property, except that it shall

not include the sale of that property in the regular course of business."

In this connection, *it will be remembered that the Oklahoma statute does not define "use" or "using," nor does it levy a tax upon "storage, or other consumption."*

Under rules and regulations prescribed by the administrative body charged with the duty of enforcing the California Use Tax Law, it is provided as follows:

> "The fact that tangible personal property is used in interstate or foreign commerce *following its storage* in this state does not exempt the *storage* of the property from tax. Property is deemed to be *stored* in this state if held in this state *any period of time whatever* following the delivery of the property to the purchaser or the termination of the interstate or foreign shipment of the property to the purchaser."

Under the California act and the rules and regulations prescribed for its enforcement, the terms "storage" and "use", *create taxable events prior to the actual conversion or consumption of the tangible personal property for use in the attainment of either interstate or intrastate operations;* that is to say, there was an instant of time between the receipt of the property by the taxpayer and its conversion to interstate purposes. As said by Mr. Justice REED in the majority opinion of the Court:

> "At that moment the tax on storage and use—retention and exercise of a right of ownership, respectively—was effective. The interstate movement was complete. The interstate consumption had not begun."

The distinction between the case at bar and the California case, *supra,* and the distinguishing line of cases ap-

plicable to and controlling under the respective circumstances presented in *Helson & Randolph* v. *Kentucky, supra,* and *Nashville C. St. L. R. Co.* v. *Wallace,* 288 U. S. 249, is forcefully stated in the opinion of the Court in the California case, *supra.* It was there said:

> "There is agreement upon the principle involved. Appellant states that an excise tax imposed directly upon the privilege of using instrumentalities in carrying on interstate transportation is a direct and unconstitutional burden on commerce. Appellees do not dispute the premise but contend that the tax is on intrastate storage and use. *They point to the definition of use as the exercise of a right of ownership, and of storage as any keeping or retention.* By the definitive terms themselves, it is urged, the taxable events are retention and installation, *not such storage as warehousing connotes,* or *use in the sense of consumption or operation.* If we conclude retention and installation, under the circumstances here developed, are intrastate taxable events, viewed apart from commerce, we must still inquire whether taxes laid upon them are not, in effect, upon commerce, and forbidden.
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> "Two lines of authority aid in considering the effect of this tax on commerce. The first makes it quite clear that *a state tax upon the privilege of operating in, or upon carrying on, interstate commerce is invalid.* States cannot tax interstate telegraph messages, or freight shipments. A license tax on sales by samples burdens one selling only goods from other states. A tax act as applied to the business of interstate communication is unconstitutional. Where a similar levy by other states may be imposed, with consequent multiplicity of exaction on commerce for the same taxable event, local tax of a privilege, measured by total gross receipts from interstate transactions, is considered identical with an exaction on the commerce itself. This

rule is applicable to a tax on gross receipts from interstate transportation; an occupation tax measured by gross receipts from radio broadcasting, and a general tax at specified rates upon the gross income of every resident, construed as 'a tax upon gross receipts from commerce without apportionment.' The measurement of a tax by gross receipts where it cannot result in a multiplication of levies is upheld.

"Appellant selects from this line the *Helson* case as determinative of the contention that a tax on use of supplies or equipment is a tax on the commerce. A state tax of three cents per gallon was imposed on gasoline 'sold at wholesale.' This phrase was defined to include gasoline bought out of the state and used within the state. *There was no definition of the word* 'use or used.' The taxpayers operated an interstate ferry, purchased gasoline in Ohio and used that portion sought to be taxed in propelling their craft in the territorial waters of Kentucky. The court considered the tax on the consumption of the gas the same as a tax on the operation of the ferry boat and therefore invalid under the rule discussed in the preceding paragraph.

"The second line of authority supports the view that use and storage as defined in the California act are taxable intrastate events, separate and apart from interstate commerce. A recent discussion of the topic sets out the precedents in support of a ruling that a tax upon the production of power by the use of which compressors drove natural gas in interstate commerce is valid. Such production is a taxable event *distinct from its consumption in commerce.* Particular attention is called by the state to the *Wallace* case. There the tax was on 'selling or *storing* or distributing gasoline.' It became due on withdrawal from storage. The tax was held applicable to gasoline, purchased out of the state and stored in the state, 'when all is withdrawn and used * * * as a source of motive power in interstate railway

operation' and valid against the objection that 'it is in effect a tax upon the use' in interstate commerce. The invalidity of such a tax arises from a levy on commerce itself or its gross receipts, not upon events prior to the commerce.

"The principle illustrated by the *Helson* case forbids a tax upon commerce or consumption in commerce. The *Wallace* case, and precedents analogous to it, permit state taxation of events preliminary to interstate commerce. The validity of any application of a taxing act depends upon a classification of the facts in the light of these theories."

For aught there appears there was no constitutional or statutory prohibition against state ad valorem taxation in California. Such prohibition is contained in the Oklahoma Constitution, as will be hereinafter discussed.

The foregoing, we believe, forecloses the argument that the Oklahoma act, as applied to tangible personal property being employed in the accomplishment of interstate commerce, falls within the principle and theory of the *Wallace* case; and, by the same token, forcefully demonstrates by a *contra* proposition that the application of the Oklahoma act to the facts and circumstances here presented is without question controlled by the principle and theory exemplified in the *Helson* and similar cases.

The state has no greater constitutional power to impose an excise tax for the use of an instrumentality of interstate commerce than it has to impose an excise tax upon the commerce itself. That things equal to the same thing are equal to each other, is axiomatic.

In *Bingaman* v. *Golden Eagle Western Lines, Inc., supra,* a state statute imposing an excise tax upon the *use* of

gasoline and motor fuel (no storage, or use defined as an incident to the right of ownership, being involved) by a common carrier engaged exclusively in interstate commerce was held invalid as placing a direct burden on interstate commerce. The statute under consideration in the *Bingaman* case (Chap. 176, Art. 2, New Mexico Session Laws of 1933) imposed an excise tax of five cents per gallon upon the sale and *use* of all gasoline and motor fuel. Section 3 of the Act prohibited any "distributor from importing, receiving, *using,* selling or distributing any motor fuel, unless such distributor was the holder of an uncancelled, annual license issued by the state comptroller." A distributor, as defined by the Act, included a corporation consuming and *using* in the state motor fuel purchased in and brought from another state. In holding the act invalid, as applied to the facts presented, the Court said:

> "As applied to appellee, an interstate carrier doing no intrastate business of any description, section 3 of the act, which exacts license fees from distributors, is plainly invalid as imposing a direct burden upon interstate commerce. *Crutcher* v. *Kentucky,* 141 U. S. 47; *International Text Book Co.* v. *Pigg,* 217 U. S. 91."

The principle that a state may not exercise its power to tax unless the activity, which is the subject of the tax, is carried on within the territorial limitations of such state, was sustained in the case of *James* v. *Dravo Contracting Co.,* 302 U. S. 134. To sustain the tax levied by the Oklahoma act, it is necessary to find that there was a taxable activity, as defined by the statute, prior to the consumption of the property in the furtherance of interstate commerce. Such is contrary to the statute itself and to the plain language of the rules and regulations promulgated in aid of the enforcement of the law.

In *Edleman* v. *Boeing Air Transport, Inc.*, 289 U. S. 249, the court sustained a Wyoming tax applied to gasoline imported for use *upon withdrawal from storage*, with respect to gasoline thereafter used by an operator for refueling airplanes flying interstate. The Wyoming tax was held valid on the ground that it applied only to taxable activity, namely, storage and withdrawal from storage *prior to its actual consumption as an instrumentality of interstate commerce.* The court there commented as follows:

> "Issue is joined on the only question raised by the pleadings, whether the taxation of the gasoline, which the respondent withdraws from storage and uses for 'filling' its planes, imposes an unconstitutional burden on interstate commerce. * * *
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> "As the statute has been administratively construed and applied, *the tax is not levied upon the consumption of gasoline* in furnishing motive power for respondent's interstate planes. *The tax is applied to the stored gasoline* as it is withdrawn from the storage tanks at the airport and placed in the planes. * * *
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> "Such a tax cannot be distinguished from that considered and upheld in *Nashville, C. & St. L. R. Co.* v. *Wallace.* There it was pointed out that 'there can be no valid objection to the taxation of the exercise of any right or power incident to ownership of gasoline which falls short of a tax directly imposed on its use in interstate commerce, deemed forbidden in *Helson* v. *Kentucky*, 279 U. S. 245.' As the exercise of the powers taxed, *the storage and withdrawal from storage of the gasoline was complete before interstate commerce began,* it was held that the burden of the tax was too indirect and remote from the function of interstate commerce to transgress constitutional limitations."

The *Edleman* case emphasizes the principle that any excise tax levied with respect to interstate commerce is invalid unless for regulation, or unless there is a clear taxable activity prior to the commencement of interstate commerce. It was on this principle that the Supreme Court held the California Use Tax Statute valid and refused *certiorari* to the Supreme Court of Washington in the case of *Pacific Telephone and Telegraph Company* v. *Henneford, et al., supra.* Under the California statute, taxable events and taxable activities were created prior to the actual consumption of the property in the furtherance of interstate commerce; under the Washington statute the actual consumption for the attainment of interstate purposes was the thing made taxable. May we again call attention to the fact that the language of the Oklahoma and Washington acts, regarding the thing to be taxed, is identical.

In *United States Airways* v. *Shaw,* 43 F. (2d) 148 (Oklahoma 1930), a similar question was before the court below. The case concerned the validity of a state excise tax of 4c per gallon on gasoline *consumed* in the state by a company operating airplanes in interstate commerce. It was there held:

> "If the state legislature intended by these enactments to tax gasoline bought in the state and consumed by patrons in the conduct of an interstate transportation business by airplanes; then, whether such consumption occurs within or without the state, the tax operates directly to burden interstate commerce because it is a charge on an instrumentality thereof."

In *Mid-Continent Air Express Corp.* v. *Lujan,* 47 F. (2d) 266 (New Mexico 1931), it appeared that an excise of 5c per gallon was imposed "upon the *use* of all gasoline and

motor fuel *used* in this state for any purpose." Relying on the *Helson* case and *U. S. Airways* v. *Shaw, supra*, the court below held that the gasoline *employed* in interstate business was exempt from the New Mexico tax.

In *Cooney* v. *Mountain States Telephone and Telegraph, Company*, 294 U. S. 384 (1935) this court was called upon to construe a Montana statute imposing a license tax "for each telephone instrument *used*, controlled and operated." It was there held that the tax being laid directly upon an instrumentality of interstate commerce, was a burden upon such commerce and, therefore, repugnant to the Commerce Clause of the Federal Constitution.

In the recent case of *McGoldrick* v. *Berwind-White Coal Mining Co.*, 84 L. ed. 343, it was said:

> "Forms of state taxation whose tendency is to prohibit the commerce or place it at a disadvantage as compared or in competition with intrastate commerce, and any state tax which discriminates against the commerce, are familiar examples of the exercise of state taxing power in an unconstitutional manner, because of its obvious regulatory effect upon commerce between the states."

In upholding the New York City municipal sales tax upon transactions consummated within the limits of the city, as a constitutional exercise of the taxing power of the city, the court, in the case last cited, was careful to point out that the operation of the city tax did not transgress the constitutional prohibition against taxes *imposing a levy for the privilege of doing it.* As to this the court said:

> "Certain types of tax may, if permitted at all, so readily be made the instrument of impeding or destroying interstate commerce as plainly call for their con-

demnation as forbidden regulations. Such are the taxes already noted which are aimed at or discriminate against the commerce or *impose a levy for the privilege of doing it*, or tax interstate transportation or communication or their gross earnings, or levy an exaction on merchandise in the course of its interstate journey. Each imposes a burden which intrastate commerce does not bear, and merely because interstate commerce is being done places it at a disadvantage in comparison with intrastate business or property in circumstances such that if the asserted power to tax were sustained, the states would be left free to exert it to the detriment of the national commerce."

Thus, it must be concluded that a state tax upon the privilege of using articles of tangible personal property in the consummation or attainment of exclusive interstate transportation is such a direct and substantial burden upon and interference with the privilege of conducting such commerce as to offend the Commerce Clause of the Federal Constitution.

IV.

It was not the intention of the legislature to lay a tax upon property or events prior to the commencement of interstate commerce.

The general rule is that taxing statutes are to be construed strictly. *Gould* v. *Gould*, 245 U. S. 151. It is likewise a long settled and general doctrine applicable to all forms of taxation that the legislative body must express its intention to tax in distinct and unambiguous language; the language employed cannot be ascertained by implication beyond its clear meaning. *State of Ohio* v. *Harris*, 229 Fed. 892, *certiorari* denied 242 U. S. 634.

Also, it is a well settled rule of construction that the continued administrative interpretation of a statute and the continued meeting of the legislature, without change or amendment of such statute, as thus interpreted, amounts to a legislative approval of the administrative interpretation thereof and, while such interpretation is not binding upon the courts, it will be strongly persuasive. Conversely, a new and different law, or amendment of an old statute, will indicate a changed legislative intent or disapproval of the administrative interpretation of the old statute. To change the phraseology will create a presumption of a change in intent. *Crawford* v. *Burke,* 195 U. S. 176.

In *U. S.* v. *Atchison, Topeka & Santa Fe R. R. Co.,* 220 U. S. 37, Mr. Justice HOLMES pointed out that the presence of a provision in one part of a statute and its absence in another is an argument against reading it as implied where omitted. This rule is particularly applicable in the interpretation of taxing statutes, and it has been held that where a provision of a statute of another state is adopted, the interpretation placed upon the statute by such other state is adopted with such provision. *Norfolk & W. Ry. Co.* v. *Cheatwood's Admx.,* (Va.) 49 S. E. 489; *James* v. *Appel,* 192 U. S. 129. The court must always be controlled by the power manifest by the act and not by the motive which initiated it. *Berryman* v. *Board of Trustees,* 222 U. S. 334.

The Oklahoma 1937 Use Tax Act was passed by the House and Senate of the State Legislature May 1 and approved by the governor May 5. The Supreme Court of the State of Washington, in *Pacific Telephone and Telegraph Company* v. *Henneford, supra,* on July 29, 1938, held the Washington act invalid under the Commerce clause of the Federal Constitution, as applied to the use of tangible per-

sonal property in the transmission of interstate messages, *certiorari* was denied by this court on February 9, 1939. On January 30, 1939, this court filed its opinion in the case of *Southern Pacific Co.* v. *Gallagher, supra,* sustaining the California tax on the storage and use of tangible personal property temporarily stored in the state although intended for installation as a part of interstate transportation facilities.

On April 14, 1939, the House and Senate of the Oklahoma Legislature passed the Use Tax Act of 1939, which was approved by the governor on April 15, 1939. (Article 12, chapter 66, Laws of 1939.) Section 7 thereof repealed the 1937 Use Tax Act, preserving, however, the right of the State to collect any taxes accruing under the repealed statute. In this connection, the court below asserts that Chapter 66, Laws of 1939, is a complete taxing code. It is true that the various taxing statutes passed by the 1939 Oklahoma Legislature have, for convenience, been codified as Chapter 66, Laws of 1939. Such acts were not passed as a complete tax code, but on the contrary were introduced, passed and approved as separate and distinct legislative acts and at different times during the 1939 session of the Oklahoma Legislature.

The levying section of the Oklahoma 1939 Use Tax Act provides:

> "An excise tax is hereby imposed on the storage, use or other consumption in this state of tangible personal property purchased on or after June 1, 1939, for storage, use or other consumption in this state at the rate of two (2%) per cent of the purchase price of such property. Such tax is hereby levied and shall be collected in an amount equal to two (2%) per cent of the

purchase price, as defined in section 1 above, of such tangible personal property."

With respect to the definition of the term "use", the 1939 Act provides as follows:

> "The term 'use' means and includes the exercise of any right or power over tangible personal property incident to the ownership of that property, except that it shall not include the sale of that property in the regular course of business."

It will be noted that the above language is identical with that used in the California statute. The question at once arises as to the intent of the legislature in repealing outright the 1937 Use Tax Act and substituting for it an act much broader in its terms and entirely different in its definitive provisions. Obviously, the legislature recognized the distinction between the tax levied by the 1937 Act and that levied by the 1939 Act. Clearly it recognized the legal limitations upon the 1937 Act.

If, as reasoned by the Court below, the purpose of the Oklahoma Legislature in passing the 1939 Act had been merely to clarify or to make plain something which it had already intended to do, would it not have amended the 1937 Use Tax Act instead of repealing it and enacting a new one? If the legislature had been sure that the taxing scope of the act was broad enough to include property stored or held prior to consumption in interstate commerce, what was its purpose in repealing the 1937 Act and adopting a new act, much broader in scope, and levying a tax upon a different basis? The inescapable answer is that the legislature of Oklahoma recognized that the 1937 Act was not as comprehensive in its taxing scope as the California Act.

By its passage of the 1939 Act, the Oklahoma legislature evidenced its own intent at the time of the passage of the 1937 Act. It is a cardinal rule of statutory construction in Oklahoma that the intention of the lawmakers when ascertained must govern and that, to ascertain such intention, the various legislative enactments on the particular subject, including any *subsequent enactment*, must be considered, together with and in light of each other. *Board of Commissioners of Creek County* v. *Alexander*, 58 Okl. 128, 159 Pac. 311; *DeHasque* v. *A., T. & S. F. R. R. Co.*, 68 Okl. 183, 173 Pac. 73; *In re Cleveland's Claim*, 72 Okl. 279, 180 Pac. 852.

As statutory provisions which have been repealed or superseded, may be looked to as an aid in the construction of amendatory acts in *pari materia*, so the Court may look to the amendment of a statute, or to a new or substituted statute to ascertain the meaning of the statute as amended or substituted. The presumption is that the legislature, in amending an existing law, or substituting another therefor, intended to make some change in the original. *Swigert* v. *Baker*, 229 U. S. 187.

The rule may be stated thus: By amending the statute the legislature demonstrated an intent to change the pre-existing law, and the presumption must be that it was intended to change the meaning of the statute in all the particulars wherein there is a material change in the language of the amended act.

In *United States* v. *Bashaw*, (C. C. A.) 50 Fed. 749, at page 754, it was said:

> "The very fact that the prior act is amended demonstrates the intent to change the pre-existing law, and the presumption must be that it was intended to change

the statute in all the particulars touching which we find a material change in the language of the act."

The rule is exemplified *In re Segregation of School District No. 58,* (Idaho) 200 Pac. 138:

> "Where changes have been introduced by amendment it is not to be assumed that they were without design; usually an intent to change the law is inferred."

See, also:

Baker v. *Tulsa Building & Loan Association,* 179 Okl. 432, 66 P. (2d) 45;
Searcy v. *State,* 64 Okl. 257, 167 Pac. 476;
Salmon v. *Johnson,* 78 Okl. 182, 189 Pac. 537;
Grayson v. *Thompson,* 77 Okl. 77, 186 Pac. 236;
Mitchell v. *Banking Corporation of Mont.,* (Mont.) 24 P. (2d) 124;
People v. *City and County of Denver,* (Colo.) 272 Pac. 629;
Panico v. *Sperry Eng. Co.,* (Conn.) 156 Atl. 802;
People v. *Weitzel,* (Calif.) 255 Pac. 792.

Apropos of defendant's contention that the 1939 Act which repealed the 1937 Act was merely for the purpose of clarification, we quote from *U. S.* v. *A. J. Woodruff & Co.,* (C. C. A., N. Y.) 175 Fed. 776:

> "Where, as in this case, the statute repeals or replaces an earlier law, any change of language is more consistent with a change of intent than with the purpose of defining or declaring the meaning of the language of the earlier repealed statute."

See, also:

In re Lloyds of Texas, (D. C., Tex.) 43 F. (2d) 383.

The principle was well expressed recently by the Sixth Circuit Court of Appeals in *U. S.* v. *Stroop*, 109 F. (2d) 891, decided February 9, 1940. There it was said:

> "The Congress must be presumed to know the language employed in former acts and the judicial construction placed upon them and if, in subsequent legislation on the same subject, different language is used, there is a presumption of manifest intention to change the law. *Johnson* v. *United States*, 225 U. S. 405, 416, 32 S. Ct. 748, 56 L. ed. 1142. If appellant's contention were sustained, the inclusion of the phrase 'during the taxable year' in the 1928 Act was meaningless and its omission in subsequent Acts unnecessary."

The law and the facts overwhelmingly demonstrate a legislative intent to change the 1937 Act; that the legislature recognized a substantial difference between the tax levied by the California statute and by the Oklahoma law; that it recognized the fact that the earlier Act was not as comprehensive as the statute in California, and that, taking notice of the decisions of this court in *Southern Pacific Co.* v. *Gallagher* and *Pacific Telephone and Telegraph Company* v. *Gallagher, supra*, and the decision of the Supreme Court of Washington, *Pacific Telephone and Telegraph Company* v. *Henneford*, and of the fact that this court denied *certiorari* in the latter case, the legislature sought to change the Oklahoma statute to conform to that in California.

V.

If the Oklahoma Use Tax Act of 1937 is to be construed as a tax on storage or on the retention and exercise of a right of ownership attaching to property after interstate commerce has ceased and before interstate use commences, then it must be held to be an ad valorem tax on property, in violation of the Constitution of the State of Oklahoma.

The decision of the Circuit Court of Appeals is based squarely upon two contradictory and irreconcilable conclusions:

First. The Oklahoma tax is the same kind of tax as the California tax upheld in the *Gallagher* cases;

Second. The Oklahoma tax is an excise tax.

The California tax having been sustained by this Court as a valid property tax, the first conclusion above stated was either erroneous, or the decision reached was wrong, because such a tax would not be valid in Oklahoma, even though valid in California.

If the first conclusion is sound, the second cannot be, for the California tax was sustained as a property tax, and if the Oklahoma tax is the same kind, it could not be an excise.

If the second conclusion is sound, the first conclusion is erroneous, for, as we think, the California tax was sustained as a valid property tax.

The construction and effect of the 1937 Act determined by the Circuit Court of Appeals as the result of the first conclusion above referred to, could not be proper because it runs afoul of a prohibition contained in the Oklahoma Constitution.

The amendment to Article 10, Section 9, of the Constitution of the State of Oklahoma, adopted by the people of the state at a special election on August 15, 1933, provides in part as follows:

> "No ad valorem tax shall be levied for state purposes nor shall any part of the proceeds of any ad valorem tax levy upon any kind of property in this state be used for state purposes * * *."

If the tax can be said to be levied upon the storage, right of control, retention, or ownership of property, and such property has a "taxable moment" and situs within the state, then it would seem that the tax in question would be a property tax, regardless of whether it is called an impost or an excise.

A tax upon any right of ownership or any direct incident thereof, other than that of actual use, is in the nature of a property tax. This is indicated by the language of Mr. Justice Reed in the case of *Southern Pacific* v. *Gallagher, supra.* The "taxable moment" doctrine deals with "property" at the moment the tax is levied. That being true, what is the tax levied against and by what is it measured? It is levied against "property" under either the California or Oklahoma statute (as construed by the Circuit Court of Appeals), and certainly, under the Oklahoma act, it must be determined by the value of the property.

There is nothing to indicate that there were legal prohibitions against ad valorem or property taxation in either of the cases of *Henneford* v. *Silas Mason Co., supra,* or *Southern Pacific* v. *Gallagher, supra.* It is stated in the separate opinion of Mr. Chief Justice Hughes, concurred in by Mr. Justice McReynolds and Mr. Justice Roberts, in

McGoldrick v. *Berwind-White Coal Mining Co., supra,* with respect to the tax in the *Henneford* case:

> "the tax was sustained as one upon property which had come to rest within the state and like other property was subject to its jurisdiction * * * 'the privilege of use is only one attribute, among many, of the bundle of privileges that make up property or ownership'."

After holding that the Oklahoma Gross Production Tax was a privilege or occupation tax, the Supreme Court of Oklahoma later held squarely that it was a property tax.

> —*Protest of Bendelari, Gross Production Tax, 1919,* 82 Okl. 97, 198 Pac. 606;
>
> *In re Skelton Lead and Zinc Company's Gross Production Tax, 1919,* 81 Okl. 134, 197 Pac. 495.

The Supreme Court of Arkansas in *Hixon* v. *School District of Marion,* 187 Ark. 554, 60 S. W. (2d) 1027, forcefully states the principles supporting petitioner's contention:

> "No definition of property can be framed which does not include the right of ownership. Property, therefore, in its broad and legal sense, is not only the physical thing which may be the subject of ownership, but is the ownership itself. The essential attributes of ownership are the rights of dominion, possession, enjoyment, and disposition, 1 Blackstone Com. 138; *Buchanan* v. *Warley,* 245 U. S. 60, 38 S. Ct. 16, 62 L. ed. 149, L. R. A. 1919-C, 210, Ann. Cas. 1918-A, 1201; *Braceville* v. *People,* 147 Ill. 66, 35 N. E. 62, 22 L. R. A. 340, 37 Am. St. Rep. 206; and these rights are included within the protective provisions of the Constitution to the same extent as the physical things to which they pertain, *Terrace* v. *Thompson,* 263 U. S. 197, 44 S. Ct. 15, 68 L. ed. 255. A tax on one of these essential attributes is, therefore, a tax on ownership, and a tax on ownership is a

tax on property. *Thompson* v. *Kreutzer,* 112 Miss. 165, 72 So. 891."

This court has held in a number of cases that taxes measured by earnings were none the less property taxes.

—*United States Express Co.* v. *Minnesota,* 223 U. S. 335, 56 L. ed. 459;

Cudahy Packing Co. v. *Minnesota,* 246 U. S. 450, 62 L. ed. 827;

Pullman Co. v. *Richardson,* 261 U. S. 330, 67 L. ed. 682;

Pollock v. *Farmers Loan & Trust Co.,* 157 U. S. 429, 39 L. ed. 759.

See also:

Thompson v. *McLeod,* 112 Miss. 165, 72 So. 891;

Thompson v. *Kreutzer,* 112 Miss. 165, 72 So. 891;

Sutherland v. *San Diego Electric Railway Co.,* 139 Cal. App. 535, 34 P. (2d) 180;

Alward v. *Johnson,* 208 Cal. 359, 281 Pac. 389.

The case last cited was affirmed by this court.

—*Alward* v. *Johnson,* 282 U. S. 509, 75 L. ed. 496.

These cases, in addition to the language used by this court in the *Gallagher* case, *supra,* squarely support the contention that the use tax levied by the California statute was a property tax and was sustained as such. If the Oklahoma act levies the same kind of tax as that levied by the California statute, the Oklahoma act is in direct contravention of the above quoted provision of the Oklahoma Constitution because it is then a property tax levied upon an ad valorem basis.

The Oklahoma act provides:

"Such tax shall be and is hereby levied, and shall

be collected in an amount equal to two (2%) per centum of the purchase price (as defined in Section 3 of this act) of such tangible personal property. * * * The term 'purchase price' shall mean the consideration paid or given or contracted to be paid or given, by any person to the seller of an article of tangible personal property for the article purchased. The term shall include, in addition to the consideration paid or given or contracted to be paid or given, the actual cost of transportation from the place where the article was purchased to the person using the same in this state."

"Ad valorem" taxes are those levied "according to the value." They are always estimated at a certain per cent of the valuation of the property.

In *Pacific Fruit Express Co.* v. *Oklahoma Tax Commission,* (D. C., Okla.) 27 Fed. Supp. 279, it is said:

"An ad valorem tax has a definite meaning. * * * 'Ad valorem (Latin). According to the valuation. Duties may be specific or ad valorem. Ad valorem duties are always estimated at a certain per cent of the valuation of the property.' 1 Bouv. Law Dictionary, Rawles' Third Revision, page 133.

"'Ad valorem. According to value. Duties are either ad valorem or specific—the former when the duty is laid in the form of a percentage of the value of the property; the latter where it is imposed as a fixed sum on each article or class, without regard to its value. The term "ad valorem tax" is as well defined and fixed as any other used in political economy or legislation, and simply means a tax or duty upon the value of the article or thing subject to taxation.' Black's Law Dictionary."

The requirement that the transporation cost be included in the purchase price, must be held to evidence a design

upon the part of the legislature to provide a method for determining the value of the property as the basis for the tax. In this event, the provision of the statute requiring the inclusion of the cost of transportation to the point of consumption evidences an intent that the value of the property shall be that basis.

Many cases hold that cost, plus transportation, is a fair measure of value. It is certain that the cost of transportation of a thing from the point of acquisition to the actual point of consumption is a part of its ultimate cost to the consumer.

That cost furnishes a measure of value is held in the following cases:

Railroad Commission of Calif. v. *Pacific Gas & Electric Co.*, 302 U. S. 388, 82 L. ed. 319;

Los Angeles Gas & Electrical Co. v. *Ry. Commission*, 289 U. S. 287, 77 L. ed. 1180;

McCardle v. *Indianapolis Water Co.*, 272 U. S. 400, 71 L. ed. 316.

If the above argument is sound, and the Circuit Court of Appeals is correct in holding that the Oklahoma tax is an "excise" tax and not a "property" tax, as also stated by the Supreme Court of Oklahoma in *Oklahoma Tax Commission* v. *Sisters of the Sorrowful Mother*, ... Okl. ..., 97 P. (2d) 888, where the validity of the act was not called in question, then the court in this case was in error in sustaining the tax on the authority of the *Gallagher* cases. If the Oklahoma tax is an excise tax, it would be levied upon the privilege of consuming the property in interstate use and commerce, and, therefore, would offend against the Federal Constitution.

VI.

Whether the tax be a property tax, an excise, an impost, or any other kind of duty, it is an ad valorem tax if measured and determined by value, and thus forbidden by article 10, section 9, of the Constitution of Oklahoma, as amended August 15, 1933.

The Supreme Court of Oklahoma has not passed upon this proposition in connection with the tax here complained of. The question was not raised or presented in the case of *Oklahoma Tax Commission* v. *Sisters of the Sorrowful Mother, supra,* but the Supreme Court of Oklahoma did say in the case of *In re Skelton Lead & Zinc Company's Gross Production Tax, 1919, supra:*

> "Nor does the fact that an occupation tax is levied upon an ad valorem basis render it any the less an occupation tax. This method is quite frequently adopted, and in some cases might be the most just and reasonable measure for such a tax. Both kinds of taxes may be levied upon the same property, and both be levied upon an ad valorem basis, and both be valid. Or both may be invalid; the property tax because it is excessive or discriminatory, and the occupation tax because the state has no power to levy it."

This case was decided before the Oklahoma Constitution was amended to prohibit the levy of ad valorem taxes for the purpose of raising revenue for state purposes, but this in no wise affects the law as announced in that decision. There could be no difference in this respect between an "occupation" tax and an "excise" tax such as is claimed to be here involved. If an occupation tax levied upon a value

basis is an ad valorem tax, then an excise tax levied upon a value basis would be an ad valorem tax. See, also:

State of Maine v. *The Grand Trunk Railway Company of Canada,* 142 U. S. 217, 35 L. ed. 994;
Powell v. *Gleason,* 50 Ariz. 542, 74 P. (2d) 47;
Corn v. *Fort,* 170 Tenn. 377, 95 S. W. (2d) 620.

Conclusion.

We respectfully submit that the Oklahoma Use Tax Act of 1937 is, in fact, an excise tax levied and assessed upon plaintiff's privilege of using property for the conduct of its exclusive interstate business of transporting crude oil by pipe line through and out of the State of Oklahoma, and is, therefore, a burden upon and interference with such business in violation of and contrary to the Commerce Clause of the Federal Constitution. It is further submitted that the Oklahoma Use Tax Act of 1937 is clearly distinguishable from the statutes construed and interpreted in *Nashville C. & St. L. R. Co.* v. *Wallace, supra; Southern Pacific Co.* v. *Gallagher, supra,* and cases controlled by the principle therein announced. This Act, because of its language and administrative definitions and interpretations, is controlled by the principle exemplified by *Helson & Randolph* v. *Kentucky, supra; Pacific Telephone and Telegraph Company* v. *Henneford,* and similar cases.

We further submit that, if the Act here in question is not construed as an excise solely upon the privilege of using, but is considered to be a tax upon storage and use, or upon the retention and exercise of a right of ownership measured by the value of the property, after interstate commerce has ceased and prior to the commencement of inter-

state use, then it must be conceded that the act levies ad valorem tax in violation of Article 10, Section 9, of the State Constitution.

The Circuit Court of Appeals rested its opinion on the decision of this court in *Southern Pacific Co.* v. *Gallagher, supra.* If Petitioner has succeeded in distinguishing the case at bar from the *Southern Pacific* case, then the opinion of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

DONALD CAMPBELL,
GUY H. WOODWARD,
Tulsa, Oklahoma,
Counsel for Petitioner.

JOHN H. CANTRELL,
Oklahoma City, Okla.,
Of Counsel.